SUPREME COURT, U. S.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

No. ..... 487

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ROBERT WILKERSON,

*Petitioner,*

—v.—

WATERFORD PARK, INC., a corporation, Chester, West Virginia, CARLYLE JOHNSON, JAY EYSTER and JOSEPH P. BROCATOR, stewards, Waterford Park Race Track, Chester, West Virginia,

*Respondents.*

RUSSELL APPLEBEE,

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Robert Wilkerson, Russell Applebee and Milton J. Dalgo pray that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of West Virginia entered in the above-entitled consolidated cases on May 26, 1969.

### Opinions Below

No opinion was delivered in the Supreme Court of Appeals of West Virginia. The opinion of the court below, the Circuit Court of Hancock County, has not been officially reported to date, but is appended hereto as Appendix A, *infra*.

### Jurisdiction

The judgment of the Supreme Court of Appeals of West Virginia was dated and entered on May 26, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

### Question Presented

Did West Virginia, which actively participates in the business of conducting thoroughbred horse racing for profit, deprive certain duly-licensed jockeys of their rights under the Fourteenth Amendment to the United States Constitution by permitting them to be excluded from a race track in West Virginia, without any hearing or specified reason?

## Constitutional, Statutory and Regulatory Provisions Involved

The constitutional, statutory and regulatory provisions involved are set forth in Appendix B, *infra*.

## Statement of the Case

Originally, thoroughbred racing was purely a sport. In recent years, with the advent of pari-mutuel wagering made possible by modern "totalizer" equipment, it has become a business conducted jointly by private "racing associations" and the various states. Twenty-six states derive a substantial portion of their revenue from this business by retaining a portion (up to 10%) of the pari-mutuel pool on each race. In West Virginia, which licenses racing to be conducted on more days of the year than any other state, this business is carefully restricted by statute, regulated by the West Virginia Racing Commission and supervised by its agents, the stewards at each race track.

The petitioners, Robert Wilkerson, Russell Applebee and Milton J. Dalgo, are jockeys by trade. They are independent contractors who are hired on a race-by-race basis by horse owners to ride horses in flat races at thoroughbred race tracks. They are now, and at all times pertinent hereto have been, duly licensed by the West Virginia Racing Commission to ride as jockeys in West Virginia (R. 1).

Waterford Park, Inc. is a West Virginia corporation which owns and operates a race track in Hancock County, West Virginia and is regularly licensed by the West Virginia Racing Commission to conduct horse race meetings

at its track (R. 2). James F. Edwards was at all times pertinent hereto the owner and President of Waterford Park, Inc.

The individual respondents, Caryle Johnson, Jay Eyster and Joseph P. Brocator, were the resident stewards at the race track at all times pertinent hereto and as a board are an agency of the West Virginia Racing Commission of the State of West Virginia (R. 12).

On May 3, 1968, the petitioners were individually notified in writing by Edwards, as President of Waterford Park, Inc., that they would be permanently barred from the grounds of its race track beginning seven days after receipt of such notice (R. 3). No reason was set forth in the notices except Edwards' judgment that petitioners' exclusion was "in the best interests of racing". The respondent stewards, representatives of the State of West Virginia at the track, refused to intervene formally but concurred in the action of Waterford Park, Inc. (R. 5).

Upon the expiration of seven days, petitioners were in fact barred from the track and could not obtain employment in their trade. They suffered very severe economic and family consequences as a result (R. 3).

The ban followed a long period of intimidation and coercion by the track management (R. 6). The petitioners believe that they were banned because they were the sole committeemen at that track of Jockeys' Guild, Inc., a national organization formed to maintain the highest standards among jockeys and uphold the best interests of horse racing (R. 4). As such, they had objected to racing on frozen and unsafe tracks and had resisted attempts to turn Guild members into "company" men—that is, to bring

them so completely under the control of track management that they could not exercise independent judgment and honestly fulfill their obligations to their employers and the public. Respondents knew the severe economic consequences which their act would have on petitioners.

Petitioners thereupon filed a petition with the West Virginia Racing Commission for a hearing regarding their exclusion (R. 15). The Commission denied their request, giving as its reason that "there are no rulings against the named subjects and, therefore, no apparent violation of the rules and regulations of this Commission" (R. 18).

Petitioners brought actions for injunctive relief in the Circuit Court of Hancock County, West Virginia (R. 1, 21, 35). The parties agreed to separate the issues of law and damages. Waterford Park, Inc. then moved to dismiss the complaint on the ground of an asserted common-law right to exclude the petitioners, and the stewards moved to dismiss on separate grounds. The court treated the motion of Waterford Park, Inc. as a demurrer and all the facts pleaded in petitioners' complaints as true (R. 69). Surprisingly, it then granted the stewards' motions on grounds of improper venue and Waterford Park's motion on the ground that it had "the absolute common law right to exclude, whether it be patron, rider or anyone else" (R. 70, 71).

Petitioners then filed a petition for writ of error in the Supreme Court of Appeals of West Virginia, a copy of which is appended hereto as Appendix C, *infra*. This petition was denied, after oral argument, without opinion. The judgments of the Circuit Court and the Supreme Court of Appeals are appended hereto as Appendix D, *infra*.

Both the Circuit Court of Hancock County and the Supreme Court of Appeals of West Virginia erred in failing to recognize that petitioners were being denied rights guaranteed to them by the Fourteenth Amendment to the United States Constitution. This federal question was raised in the Circuit Court of Hancock County by the allegations in petitioners' complaints that Waterford Park, Inc. had acted arbitrarily and denied plaintiffs their rights thereby (R. 2 para. (8); R. 4 para. (12); and R. 5 para. (17)), in the arguments based on the Fourteenth Amendment made to the Circuit Court of Hancock County in the supplemental memorandum on behalf of plaintiffs, which was referred to in the judgment of that court (R. 72), and on oral argument. Federal questions again were raised in the tenth assignment of error in the petition for a writ of error to the Supreme Court of Appeals of West Virginia (Appendix C, *infra*) and on oral argument before that court. These federal questions were summarily dismissed by both courts.

**Argument for Writ**

The Supreme Court of Appeals of West Virginia, by refusing to review the decision of the Circuit Court of Hancock County, let that decision stand. The decision was that Waterford Park, Inc., which was licensed by the State of West Virginia to conduct a thoroughbred race meeting, could arbitrarily and without any reason or hearing exclude three duly licensed jockeys from the track premises and thus prevent them from pursuing their profession. It is respectfully submitted that the decision is demonstrably offensive to the Fourteenth Amendment to the United States Constitution.

## I.

## Petitioners were deprived of their rights guaranteed by the Fourteenth Amendment.

When petitioners were barred from Waterford Park without notice or hearing and for no specific reason, they were deprived of their procedural and substantive rights without due process of law and were denied the equal protection of the laws, all in violation of the Fourteenth Amendment.

### a. *Petitioners were excluded from the race track without procedural due process of law*

It was incumbent upon Waterford Park, Inc., the stewards at the track, the West Virginia Racing Commission, and the courts of West Virginia to observe all of the procedural rights guaranteed by the Fourteenth Amendment in any proceeding which deprived petitioners of their freedom to ride at Waterford Park.

In *Schroeder* v. *City of New York,* 371 U.S. 208 (1962), this Court held that, in any proceeding which is to be accorded finality, all interested parties must be given notice which is reasonably calculated under all the circumstances to apprise them of the pendency of the action and to afford them an opportunity to present their objections. In *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96 (1962), this Court held that an attorney who had not been admitted to practice in New York because of the adverse report of another attorney was entitled to notice, a hearing, and the right to confront his accusers. More recently, this Court has held that an attorney is entitled to

all the procedural guarantees of due process in a state disbarment proceeding. *In Re Ruffalo,* 390 U.S. 544 (1967).

Here, petitioners were summarily advised that they were barred from entering the race track in letters from Edwards, the President of Waterford Park, Inc. They had never been advised that action was contemplated against them; they had never been notified of the reasons why they might be barred; they had never been afforded a hearing or other opportunity to speak in their own defense; they had never been confronted by those who thought they should be barred (if there were any besides Edwards and the resident stewards, two of whom were on his corporation's payroll, although agents of the State). In other words, petitioners were not afforded any of the rights to procedural due process which this Court said all persons are entitled to in *Schroeder* and *Willner, supra.* Their exclusion was a *fait accompli.*

The denial of these procedural rights to the petitioners was particularly serious for them in the light of the effect which their exclusion from Waterford Park had upon their ability to earn a living and support their families. In *Greene* v. *McElroy,* 360 U.S. 474 (1959), this Court held that removing the security clearance of an aeronautical engineer resulted in a substantial restraint upon his private employment opportunities. The Court ordered that the engineer be afforded a fair hearing in accordance with the requirements of procedural due process. In *Meredith* v. *Allen County War Memorial Hospital Comm'n,* 397 F. 2d 33 (6th Cir. 1968), the Sixth Circuit held that a doctor who was dismissed from a public hospital was entitled to all of the procedural rights guaranteed by the due process clause. The court found these rights particularly

important because the action taken by the hospital might easily foreclose him from practicing his profession elsewhere. It noted the limited number of hospitals in the area and the stigma attached to dismissal.

Edwards' letter to petitioners stated that his action was in the "best interests of racing". This implied wrongdoing, and petitioners were never given an opportunity to deny it (R. 4, para. 12). His action was calculated to have the same effect on petitioners' ability to obtain employment elsewhere as that in *Greene* and *Meredith, supra.*

**b.** ***The rule of law adopted below to justify petitioners' arbitrary exclusion was not compatible with substantive due process of law***

The Circuit Court of Hancock County, in its opinion below, stated:

> "I, therefore, reluctantly rule, without regard to equities which may or may not be present on either or both of the sides of this controversy, that Waterford does have *the absolute common law right to exclude,* whether it be patron, rider or anyone else. The sole exception so far as the cases are involved would appear to be exclusion because of race, creed or color." App. A, *infra.* [emphasis added]

This rule of law is not compatible with substantive due process. The Circuit Court was under a duty to consider petitioners' rights under the federal Constitution and to weigh petitioners' Constitutional rights against the common law rights of Waterford Park, Inc. (Indeed, there was no reason for the stewards, the West Virginia Racing Commission or the West Virginia courts to assume that

petitioners were not excluded because of race, creed, color or national origin or because of their exercise of free speech, simply because no reason for exclusion was specified.)

Under the Constitution, a state may not interfere with a person's freedom to pursue his occupation without a rational justification for doing so. In *Schware* v. *Board of Bar Examiners of New Mexico,* 353 U.S. 232 (1957), this Court stated:

> "A State cannot exclude a person from the practice of law *or from any other occupation* in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. . . . A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness to practice law. . . . Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he failed to meet their standards or where their action is invidiously discriminatory." 353 U.S. at 238-239. [emphasis added; citations omitted]

This Court noted that one does not engage in one's profession merely as a matter of the State's grace:

> "We need not enter into a discussion of whether the practice of law is a 'right' or 'privilege'. Regardless of

how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly the practice of law is not a matter of the State's grace." 353 U.S. at 239 n.5 [citation omitted].

At the very minimum, there must be a showing of justification. In *Martin* v. *Monmouth Park Jockey Club*, 145 F.Supp. 439 (D.N.J. 1956), *aff'd mem.*, 242 F.2d 344 (3rd Cir. 1957), where federal Constitutional questions were not discussed, the record of the plaintiff jockey recited many violations of racing rules as well as several arrests and a prior ten year suspension for betting on a horse racing against the horse the jockey was riding. The United States District Court, without reference to the Constitution, decided that, in view of the jockey's record of bad conduct, there was sufficient justification for the exclusion. In the instant case, the petitioners' records are without blemish and there is no claim whatsoever that the exclusion was justified under state or federal law.

***c. Petitioners were denied the equal protection of the laws***

The act of the management of Waterford Park, Inc. in excluding petitioners from the race track, the act of the stewards in concurring, while at the same time refusing to intervene formally, the act of the West Virginia Racing Commission in refusing petitioners an administrative hearing and thus sustaining such exclusion, and the act of the Supreme Court of Appeals of West Virginia in rejecting petitioners' appeal each resulted in the denial to petitioners of the equal protection of the laws.

Waterford Park, Inc., with the concurrence of the stewards, barred Wilkerson, Applebee and Dalgo from its race track, but did not bar any other jockeys, thus, discriminating against these three. If there was no reasonable basis for this discrimination, petitioners were denied the equal protection of the laws. *Lindsley* v. *National Carbonic Gas Co.*, 220 U.S. 61 (1911). The record indicates that there was no reason; it was completely arbitrary.

In *Lindsley*, this Court laid down the following rules for determining whether or not a discriminatory act violated the equal protection clause:

> "1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is *without any reasonable basis and therefore is purely arbitrary.* 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." 220 U.S. at 78, 79. [emphasis added]

Here petitioners have carried that burden. It is difficult to imagine a more perverse discrimination than one for

which, as in this case, no reason is specified. Can it be possible that the most invidious and malicious discrimination can be shielded from the Constitution by silence?

Petitioners were the sole committeemen of Jockeys' Guild, Inc. at Waterford Park. As such, they represented other jockeys at the track who were members of the Guild for purposes of the Rules of Racing, Rule 186, App. B, *infra*. It is entirely possible that the action of Waterford Park, Inc. in discriminating against petitioners was, as pleaded, motivated solely by Edwards' animus toward the Guild and its vigilance, which represented a constant threat to his assumption of absolute power and dominion over everything and everyone at Waterford Park (including the representatives of the state). A classification based upon malice is most certainly an unreasonable basis for discrimination under the rules of *Lindsley*, but in any case the act of Waterford Park, Inc. was patently arbitrary and denied petitioners the equal protection of the laws.

Both the stewards and the West Virginia Racing Commission were agents of the State of West Virginia. Each denied petitioners any relief because no rules of racing had been violated. By this very admission, both conceded that petitioners' exclusion from Waterford Park was arbitrary. By refusing to act, they also denied petitioners the equal protection of the laws.

The courts of West Virginia, having been duly informed that Waterford Park had specified no reason for excluding petitioners and that the stewards and State Racing Commission had found no reason to exclude petitioners on their own motion, were bound to order Waterford Park, Inc., as a licensee of the State of West Virginia, to readmit

petitioners. In refusing to order Waterford Park, Inc. to do so, the courts of West Virginia themselves became parties to the discrimination and thereby denied petitioners the equal protection of the laws. *Shelley* v. *Kraemer,* 334 U.S. 1 (1948); *Barrows* v. *Jackson,* 346 U.S. 249 (1953); *Edwards* v. *Habib,* 397 F.2d 687 (D.C. Cir. 1968), *cert. denied* 393 U.S. 1016 (1969).

## II.

**The act of excluding petitioners from Waterford Park constituted "state action" by West Virginia within the ambit of the Fourteenth Amendment.**

Petitioners respectfully submit that they are entitled to the protection of the Fourteenth Amendment to the Consitution since the act of excluding them from Waterford Park constituted "state action" by West Virginia.

### a. *West Virginia's involvement in racing at Waterford Park was so pervasive as to establish a "nexus" between the two for purposes of the Fourteenth Amendment*

Waterford Park, Inc. was so extensively entwined with agencies of West Virginia, so closely regulated and supervised by that state and so utterly dependent upon the authority of the state for its existence and operations that its acts constituted "state action" by West Virginia within the ambit of the Fourteenth Amendment. As this Court recognized in *Evans* v. *Newton,* 382 U.S. 296 (1966),

> "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to

the constitutional limitations placed upon state action." 382 U.S. at 299 (1966)

In *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), this Court held that racial discrimination at a lunch counter was "state action" and as such was prohibited by the Fourteenth Amendment. The only connection between the corporation operating the lunch counter and the State of Delaware was that the corporation leased space in a building owned and maintained by a state agency. The building had been built as a parking garage to alleviate traffic congestion in the city, and the agency leased space to the corporation in order to make the garage economically feasible. This remote connection was deemed sufficient to impute the discrimination of the Eagle Coffee Shop, the lessee, to the state. The Court said:

> "The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." 365 U.S. at 725.

Here, the "nexus" between the State of West Virginia and Waterford Park, Inc. was infinitely more discernible than the remote connection between the State of Delaware and the Eagle Coffee Shop in *Burton, supra.*

Thoroughbred horse racing in West Virginia is authorized by Articles 23 and 24 of Chapter 19 of the West Virginia Code.* These articles control every conceivable

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* All references to "Code Sections" in this petition are to the West Virginia Code, and the pertinent parts of all Code sections cited in this petition are set forth in Appendix B, *infra.*

aspect of such racing, as may be seen from the following sample provisions:

Code Section 19-23-1 — establishes a racing commission to regulate horse racing in the State.

Code Section 19-23-1 — provides that no person shall construct a race track without first receiving a permit.

Code Section 19-23-4 — requires a license from the state to conduct a race meeting at which racing is permitted for stakes.

Code Section 19-23-5 — provides how racing dates shall be fixed.

Code Section 19-23-6 — provides a procedure for suspending or revoking a license to conduct racing.

Code Section 19-23-7 — imposes a tax on pari-mutuel pools and race tracks.

Code Section 19-23-9 — restricts wagering to the pari-mutuel system.

Code section 19-23-10 — provides a criminal penalty for conducting a race meeting without a license.

Code Section 19-23-13 — provides for the licensing of jockeys.

Code Section 19-23-14 — provides for fixing the minimum number of races to be held on any racing day.

Waterford Park, Inc. had been duly licensed to conduct a race meeting, pursuant to Code Section 19-23-4, at the time petitioners were barred from its track. However, petitioners do not rely on the proposition that state action can be imputed from the issuance of this license alone. They base their assertion of state action on the high degree of regulation and supervision to which Waterford Park, Inc. was subject as a licensee.

In *Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451 (1952), this Court found that a sufficient nexus existed between a commission created by Congress to supervise transportation in the District of Columbia and a private bus company to justify imposing Constitutional restraints upon the bus company. The Court emphasized the extensive regulatory power of the Commission and stated:

> "In finding this relation we do not rely on the mere fact that Capital Transit operates a public utility on the streets of the District of Columbia under authority of Congress. Nor do we rely upon the fact that, by reason of such federal authorization, Capital Transit now enjoys a substantial monopoly of street railway and bus transportation in the District of Columbia. We do, however, recognize that Capital Transit operates its service under the *regulatory supervision* of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress." 343 U.S. at 462 [emphasis added; footnotes omitted]

Thoroughbred horse racing in West Virginia is regulated by the West Virginia Racing Commission, Code Section 19-23-1. The Commission has been granted extremely broad powers. Indeed, the Supreme Court of Appeals of West

Virginia has construed Code Section 19-23-1 as bringing all persons connected with horse racing under commission control. *State ex rel. Spiker* v. *West Virginia Racing Commission*, 135 W.Va. 512, 63 S.E. 2d 831 (1951). This is so despite the fact that Code Section 19-23-15 directs the Racing Commission not to "interfere in the internal business or affairs of any licensee".

The Racing Commission in turn has adopted a comprehensive body of regulations, called the Rules of Racing, pursuant to the authority given it in Code Section 19-23-1.** These rules govern all races conducted by licensed racing associations, Rule 8. Under the rules, the Racing Commission can enter any place on the premises of Waterford Park, Rule 54. It prescribes the minimum number of races that Waterford Park, Inc. may conduct at its track each day during each licensed race meeting, Rule 60. It must approve the stakes offered by Waterford Park, Inc. for every race conducted during the meeting, Rule 56. It must approve the starting time of each race conducted by Waterford Park, Inc. and the time interval between races, Rule 61.

Waterford Park, Inc. must furnish the Racing Commission with a list of the names, addresses, duties and rates of compensation of all its officers and administrative personnel at least 30 days prior to the start of any race meeting, Rule 51. It must furnish the Racing Commission with a similar list covering all other employees of the race track at least 10 days before the meeting, Rule 51. It must furnish the Racing Commission with a copy of its payroll, Rule 278. It must notify the Racing Commission of the

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** All references to "Rules" in this petition are to the Rules of Racing (1966), and the pertinent parts of all Rules cited in this petition are set forth in Appendix B, *infra*.

discharge of any "official or employee, mutual or operative", Rule 52. It must inform the Racing Commission of any change in its stockholders or in the holdings of any particular stockholder, Rule 53.

The most cursory reading of the West Virginia Rules of Racing demonstrates that horse racing at Waterford Park is an industry regulated far more extensively than was the bus company in *Pollak, supra.* The Rules of Racing operate so as to make the conduct of a thoroughbred race meeting at Waterford Park, Inc. a *joint effort* of the State of West Virginia and the racing association. Under the Rules of Racing it is relatively easy to discern the function of track personnel, but it is unclear and perhaps unimportant whether their functions are being performed on behalf of the state or the track or both as joint venturers. Waterford Park, Inc. must pay the salary of a general inspector appointed by the State Racing Commission, Rule 297. The same is true of the patrol judges and the state veterinarian, Rules 302 and 317. In fact, Waterford Park, Inc. must pay the salaries of all employees of the Racing Commission assigned to its grounds, except one of the stewards, Rule 52. Waterford Park must furnish the State Racing Commission with a private office on its grounds, without compensation, Rule 55. At the bare minimum, these "government officers" can be said to be acting jointly with a private person, Waterford Park, Inc. This fact alone justifies a finding that the arbitrary act of Waterford Park in excluding petitioners without notice, hearing or specified reason constitutes "state action". *United States* v. *Price,* 383 U.S. 787 (1964).

The role of the stewards in particular demonstrates that races at the track are conducted jointly by West

Virginia and Waterford Park, Inc. The stewards supervise all aspects of racing at the track, Rules 279 through 296. There are three such stewards: one appointed by Waterford Park, Inc.; the second by the Racing Commission; and the third by the other two, Rule 279. While the stewards are unquestionably agents of the State of West Virginia, it is pertinent that all three officially correspond on stationery bearing the letterhead of Waterford Park, Inc. The salaries of two of the three stewards are fixed and paid by Waterford Park, Inc. Significantly these two stewards were represented in the state courts below by counsel for Waterford Park, Inc. In reality, the stewards are simply Waterford Park, Inc. acting under color of authority of West Virginia.

That horse racing at Waterford Park is in effect a joint venture between Waterford Park, Inc. and the state is even more clear when the financial aspects are scrutinized. Out of the 15% deducted from the pari-mutuel pool at each race conducted at Waterford Park during 1968, 9¼% was paid to Waterford Park, Inc. and 5¾% to West Virginia. During 1968, West Virginia derived $4,374,735 from operations at Waterford Park.[1] This was 48.4% of West Virginia's total racing revenue ($9,031,358).[2] What West Virginia collected, therefore, was not a tax in substance; it was the proceeds of a joint venture.

Lower courts, following *Burton, supra,* have recognized that the mere fact that a private corporation is involved

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[1] Annual Report of the West Virginia Racing Commission to the Governor of the State of West Virginia for 1968, 5, January 15, 1969.

[2] *Id.*

is of no consequence, especially when competing Constitutional rights of individuals are presented and there has been a showing of an interrelationship between the corporation and the state. *Farmer* v. *Moses,* 232 F.Supp. 154 (S.D.N.Y. 1964); *Louisiana High School Athletic Ass'n* v. *St. Augustine High School,* 396 F.2d 224 (5th Cir. 1968). In *Farmer,* the question was whether the New York World's Fair Corporation, which had been organized as a private membership corporation, was sufficiently linked to the State of New York so that it had to comply with the Fourteenth Amendment. The District Court concluded that it would be "sophistry" to argue that the Fair was a completely private venture. It held that the act of the corporation in preventing the plaintiffs from disseminating handbills on the Fair grounds constituted state action violating the Constitution.

Here we have a situation where the State of West Virginia was just about as deeply involved in a business activity as a state can be. Its legislature had provided that this business could only be conducted pursuant to a license and had established a Commission to regulate the licensees. That Commission had adopted exhaustive substantive and procedural rules regulating every aspect of the business. Under these rules, the stewards were charged with the duty of investigating complaints against jockeys and, if justified, of "ruling them off the track", Rules 88, 89 and 90.

Despite this established procedure, Waterford Park summarily excluded petitioners from the race track, without a hearing, without even a reason. Though concurring in this arbitrary action, the resident stewards refused to act formally; the Racing Commission refused to act; the courts

refused to act; and a private corporation was left wielding the full power of its joint venturer, the State of West Virginia, to "rule" petitioners off the track. No act by Waterford Park, Inc. could more clearly have constituted "state action" by West Virginia for purposes of the Fourteenth Amendment.

***b. The actions of the stewards, the West Virginia Racing Commission and the West Virginia courts themselves constituted "state action" for purposes of the Fourteenth Amendment.***

Once petitioners had been excluded from Waterford Park, the Board of Stewards still had the power to determine if their exclusion was proper, Rule 280. The West Virginia Racing Commission had the power, under its own rules, to conduct a hearing with respect to any discontinuance of a jockey's employment or engagements, Rule 50. Thus either could have conducted a hearing into why petitioners were being excluded from Waterford Park on its own motion, whether or not petitioners had requested a hearing and whether or not it believed a rule of racing had been violated.

If the Racing Commission found, at a hearing, that Waterford Park, Inc. had acted unreasonably and arbitrarily in barring petitioners, it had the power to order them readmitted. If Waterford Park, Inc. thereafter refused to readmit petitioners, the Racing Commission had the power to order its license revoked, Rules 50, 171. Presumably the only reason the Racing Commission did not conduct a hearing was that it knew that Waterford Park, Inc. had no legitimate reason for barring petitioners from its track, and it preferred to look the other way.

Even if no "nexus" had existed between the State of West Virginia and Waterford Park, Inc., this independent refusal to act formally by the stewards and the State Racing Commission itself constituted "state action". State action, for purposes of the Fourteenth Amendment, can take the form of "negative state action"—that is, the failure to act. *Baker* v. *Carr*, 369 U.S. 186 (1962). In *Huey* v. *Barloga*, 277 F.Supp. 864 (N.D. Ill. 1967), the District Court recognized that the neglect of state officials to enforce the rights of oppressed persons constituted state action for purposes of the Fourteenth Amendment. In *United States* v. *U. S. Klans, Knights of the Ku Klux Klan, Inc.*, 194 F.Supp. 897 (M.D. Ala. 1961), the District Court held that the failure of law enforcement officers to enforce the law constituted state action for like purposes.

Likewise, the refusal of the Circuit Court of Hancock County and the Supreme Court of Appeals of West Virginia to enjoin Waterford Park, Inc. from barring petitioners from the track constituted "state action" for purposes of the Fourteenth Amendment, independent of any "nexus" between the State of West Virginia and Waterford Park, Inc. *Barrows* v. *Jackson, supra. Shelley* v. *Kraemer, supra.*

In *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), this Court held that a state court's judgment against a newspaper in a libel suit abridged the newspaper's right of free expression under the First Amendment, as made applicable to the states by the Fourteenth Amendment. The suit had not been initiated by the state; it was a suit between private litigants, but the decision of the court itself was held to constitute state action for purposes of the Fourteenth Amendment. See also *Common-*

*wealth of Pennsylvania* v. *Brown*, 392 F.2d 120 (3rd Cir. 1968), *cert. denied*, 391 U.S. 921 (1968), and *Edwards* v. *Habib, supra.*

Thus, the action of Waterford Park, Inc. and the stewards in barring petitioners from the track, compounded by the refusal of the West Virginia Racing Commission to grant a hearing and the refusal of the West Virginia courts to grant injunctive relief, have resulted in a complete denial by West Virginia of each and every right of petitioners to procedural and substantive due process of law and to the equal protection of the laws, as guaranteed by the Fourteenth Amendment to the United States Constitution.

## CONCLUSION

**For the reasons stated, this Court should issue a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia and consider the constitutional questions of substance involved therein.**

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